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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

CITIZENS OF HUMANITY, LLC,

Plaintiff, Cross-defendant and
Appellant,

v.

DANEMAR, S.A.,

Defendant, Cross-complainant and
Appellant;

DANIELLE ELBAZ et al.,

Defendants and Respondents.

B224966

(Los Angeles County
Super. Ct. No. BC412629)

APPEALS from a judgment of the Superior Court of Los Angeles County,
Ralph W. Dau, Judge. Affirmed in part and reversed in part.

Browne Woods George, Edward A. Woods, Peter W. Ross, Benjamin D. Scheibe;
Law Offices of Gary Freedman and Gary Freedman for Plaintiff, Defendant and
Appellant Citizens of Humanity, LLC.

Law Offices of Steven Soloway and Steven Soloway for Defendant and Appellant,
Danemar, S.A., and for Defendants and Respondents, Danielle Elbaz and Marc Elbaz.

Plaintiff and appellant Citizens of Humanity (COH) engaged defendant and appellant Danemar, S.A., and its owners, Danielle and Marc Elbaz, to be the exclusive distributor of COH's designer jeans and clothing in Spain and Portugal. COH eventually terminated the parties' written agreement and sued Danemar and the Elbazes for failure to satisfy the contract's minimum purchase requirements. Danemar filed a cross-complaint.

A jury found against Danemar, but in favor of the Elbazes on COH's breach of contract claim, and awarded damages. The jury also awarded damages to Danemar on its cross-complaint. COH moved unsuccessfully for a new trial, arguing that the damages award of approximately \$48,000 was inadequate.

COH appealed, arguing there was insufficient evidence to support the jury's determination that the Elbazes had no individual liability for breach of the distribution agreement they signed, and the judgment and cost award in their favor must be reversed. We agree.

Danemar also appeals from the judgment arguing the trial court erred when it excluded evidence that the minimum purchase requirements were only suggested "targets," and that COH's sole remedy for breach was termination of the distribution agreement. Danemar also maintains the trial court erred when it refused to instruct the jury on Danemar's claim for intentional interference with contract, and when it instructed the jury that Danemar was entitled only to lost profits for orders to be shipped prior to termination of the agreement. None of Danemar's contentions has merit.

FACTUAL BACKGROUND

COH designs and manufactures high-end jeans and denim apparel. In 2004, Danemar, a Spanish corporation, became COH's exclusive distributor in Spain and Portugal. That relationship continued through 2007 through a series of year-long contracts, each of which required Danemar to meet a minimum purchase requirement. Danemar never satisfied the minimum quantity purchase requirements in any annual distribution agreements, though it came "very close" to doing so in 2007. Before 2009, COH never told Danemar that it owed COH damages or would be responsible for profits

COH would have made but for Danemar's failure to purchase the minimum quantities specified in any distribution agreement.

According to Margarita Puig, a Danemar employee and the brand manager responsible for COH sales in Spain and Portugal, Danemar was unable to satisfy the annual minimums because COH consistently failed timely to provide Danemar with its seasonal samples of the COH collections in time to allow Puig to display the collection for Danemar's customers during Madrid Fashion Week. Fashion Week, held twice yearly, is when buyers for Spanish clothing companies head to Madrid showrooms to view designers' sample collections and spend most of their budgets for an upcoming season's collections. Because COH consistently provided its sample collections in a piecemeal fashion (Puig usually had only 15 of 80 pieces from a collection Danemar was obligated to show in its entirety), and never in time for Fashion Week, Puig was forced to travel all over Spain after finally receiving the sample collection to try to obtain orders after many buyers already had depleted their budgets for the upcoming season. Puig complained several times to COH that its untimely delivery of samples rendered Danemar unable to properly market the COH product line or to sell and take orders; COH promised to deliver the samples earlier in the future but did not. Puig testified that the only sample collection Danemar received on time was one COH delivered in early 2009 shortly before it terminated the 2008/09 distribution agreement at issue here. Puig also testified that when COH terminated the agreement she was still in the process of selling the Fall/Winter 2009 line, and was not required to submit Danemar's first quarter orders until late March or early April 2009. According to defendant and respondent Danielle Elbaz, who owns Danemar with her husband, defendant and respondent Marc Elbaz, fashion shifts markedly from season to season, especially in the market encompassing the products COH offers, viz., high fashion, expensive jeans. Customers may find one season's collection very appealing, and not like another collection at all.

On January 1, 2008, COH entered the two-year distribution agreement at issue here (Agreement). The Agreement is contained in a letter addressed collectively to Danemar and Marc and Danielle Elbaz, and begins with the salutation "Dear Danielle."

Unlike prior distribution agreements the Agreement is signed by the Elbazes as individuals, and by Marc Elbaz on behalf of Danemar (only Danemar was a signatory to the parties' prior contracts). The Agreement consistently uses the undefined term "you" in setting out the rights and obligations contained therein, and establishes an exclusive distributorship for the "Territory" of Spain and Portugal for 2008 and 2009. The Agreement also provides that:

"2. The minimum quantities you will purchase for the Territory for the shipping period ending December 31, 2008 will be 12,000 women's bottoms and 1,000 men's bottoms. The minimum quantities you will purchase for 2009 will be 14,000 women's bottoms and 1,500 men's bottoms. For 2008 and 2009, at least 20% of such minimum quantities must be purchased for delivery to you by March 31st of each year, at least 45% of such minimum quantities (on a year-to-date basis) must be purchased for delivery to you by June 30th of each year and at least 75% of such minimum quantities (on a year-to-date basis) must be purchased for delivery to you by September 30th of each year. [¶] . . . [¶]

"8. You will sell only to top quality specialty and department retail stores . . . with a first class image, product selection and reputation and selling only the highest quality apparel products. You must obtain our prior written approval before selling to any retailer with three or more retail locations

"9. The maximum price you will sell Citizens of Humanity products for is as follows: (a) Basic styles at $1.38 \times (\text{COH's normal US wholesale selling price} \times .95) \times 1.12$; and (b) Fashion styles at $1.53 \times (\text{COH's normal wholesale selling price} \times .95) \times 1.12$ [¶] . . . [¶]

"14. Any disputes arising out of our agreement shall be resolved exclusively in the state or federal courts located in Los Angeles County, California and the parties agree that such courts shall have sole and exclusive jurisdiction to resolve such disputes. This agreement and the rights of the parties arising from this agreement shall be governed exclusively by the laws of the State of California applicable to agreements to be performed wholly within the State of California. [¶] . . . [¶]

“16. Failure to abide by any of the provisions of this agreement will be grounds for immediate termination of this agreement.

“17. This agreement sets forth our entire agreement regarding the distributorship for COH products for the years 2008 and 2009, and it supersedes all prior agreements and discussions with regard to those years. There are no promises or agreements that have been made to you by COH or any person acting on behalf of COH which are not set forth in this agreement, and you were not induced to enter into this agreement by any statement or promise not set forth in this agreement. This agreement may only be modified by a written agreement signed by you and an authorized officer of COH. [¶] . . . [¶]

“Agreed: Jerome Dahan, President
“CITIZENS OF HUMANITY, LLC

Agreed: _____
Danielle Elbaz

“Agreed: _____
“Marc Elbaz

“Agreed: _____
“DANEMAR, S.A.”

Gary Freedman (Freedman), COH’s General Counsel and Chief Operating Officer whose law office drafted the Agreement, testified that there was no discussion between the parties regarding the reason for the inclusion of separate signature lines for the individual Elbazes, or the integration clause contained in paragraph 17 of the Agreement. Before signing the Agreement, Danielle Elbaz asked Puig if she thought she would be able to satisfy the specified “objective of quantities.” Danielle Elbaz has been involved in the fashion industry in Spain for at least 40 years as both buyer and distributor. She testified that COH never explained why she or her husband had been asked to sign the Agreement, and never told them they were assuming personal liability under the Agreement. Danielle Elbaz simply signed the document presented to her by her husband. She never asked that any language be added to or deleted from the Agreement.

In 2008, respondents purchased 5,749 fewer units than the minimum specified in the Agreement. Respondents also failed to purchase the minimum number of units required for the first quarter of 2009. In late 2008 and again at a meeting in early

February 2009, respondents told COH that Danemar intended to purchase about the same number of units in 2009 as it had purchased in 2008, about 5,000–5,500 units.

On March 16, 2009, Freedman notified Danielle Elbaz that COH was terminating the Agreement due to Danemar’s failure to purchase the contractual minimums in 2008 and the first quarter of 2009, and that “Boy Capel” would henceforth be COH’s exclusive sales agent in Spain and Portugal.¹ COH asked Danielle Elbaz to help make the transition as smooth as possible by: (1) immediately turning over to COH and Boy Capel any unfilled customer orders, (2) immediately turning over to Boy Capel COH’s current season sample line, and (3) turning over to COH the details of and all remaining inventory in Danemar’s possession.

In response, Danemar demanded COH: (1) ship stock for which Danemar had already paid, (2) fill additional orders submitted by Danemar after March 16, 2009, and (3) buy back Danemar’s stock of COH inventory on hand.

PROCEDURAL HISTORY

In April 2009 COH filed this action for breach of written contract against Danemar and the individual Elbazes, seeking recovery of profits it would have earned had the defendants purchased the contractually specified minimum number of units in 2008 and 2009. Danemar (but not the Elbazes) filed a cross-complaint, the operative version of which asserts causes of action for breach of a written contract, breach of the

¹ Boy Capel, which is owned by former Danemar employees, approached COH in November 2008 indicating an interest in becoming its distributor in Spain and Portugal. Thereafter, COH and Boy Capel engaged in discussions which resulted in COH’s decision in early March 2009 to appoint Boy Capel its exclusive sales agent in Spain and Portugal. Boy Capel began taking orders for COH apparel on March 2, 2009.

COH did not immediately advise Danemar of its decision to change distributors. Rather, COH told Danemar to keep selling. On March 11, 2009 COH demanded that Danemar prepay for orders it placed. Danemar paid COH \$24,541.35 for a portion of the \$51,383 in orders it had already placed, but COH did not ship any orders and instead sent those orders to Boy Capel to be filled.

implied covenant of good faith and fair dealing, intentional interference with contract and a common count for money had and received.

A jury trial was conducted in March 2010. The jury found that Danemar, but not the Elbazes, breached the Agreement and awarded COH \$47,680 in damages for breach of contract. The jury also returned a verdict in favor of Danemar on its cross-claims for breach of contract and money had and received, and awarded Danemar \$30,677. Judgment was entered on March 24, 2010, and the Elbazes were awarded \$700 in costs.

COH filed a motion seeking a new trial on the ground that the jury's award was inadequate. The motion was denied. COH filed an appeal from the judgment and order denying its motion for a new trial on the issue of damages. Danemar filed a cross-appeal from the judgment.²

DISCUSSION

I. The Appeal by COH

COH maintains there is insufficient evidence to support the judgment and cost award in favor of the Elbazes on COH's breach of contract claim, and it is entitled to a new trial on damages. We agree there is insufficient evidence to support the finding that the Elbazes were not parties to the Agreement, and will reverse the judgment and cost award in their favor.

1. All three defendants are parties to the Agreement.

The evidentiary record, language of the Agreement and rules of contract interpretation support COH's assertion that it entered into the written 2008/09 distribution Agreement with Danemar, as well as its individual owners. Civil Code section 1641 requires that: "The whole of a contract is to be taken together, so as to give effect to every part, if reasonably practicable, each clause helping to interpret the other." "Courts must interpret contractual language in a manner which gives force and effect to

² Neither appeal takes issue with the verdict in favor of Danemar on its cross-claims for breach of contract and a common count, or with the \$30,677 award to Danemar in the cross-action.

every provision, and not in a way which renders some clauses nugatory, inoperative or meaningless.” (*City of Atascadero v. Merrill Lynch, Pierce, Fenner & Smith, Inc.* (1998) 68 Cal.App.4th 445, 473.) When construing a “statute or instrument, the office of the Judge is simply to ascertain and declare what is in terms or in substance contained therein, not to insert what has been omitted, or to omit what has been inserted; and where there are several provisions or particulars, such a construction is, if possible, to be adopted as will give effect to all.” (Code Civ. Proc., § 1858.)

The Elbazes maintain the jury was correct to find they had no individual contractual liability because, apart from their signature lines, the Agreement fails to mention them at all, does not require them to do anything and does not benefit them as individuals. The Elbazes also assert that, apart from the new individual signature lines, the Agreement does not differ from any preceding distribution agreement between Danemar and COH, none of which contained lines for individual signatories. The effect of the Elbazes’ separate signatures is a legal question, which we review *de novo*. (*Brack v. Omni Loan Co., Ltd.* (2008) 164 Cal.App.4th 1312, 1320.) The Elbazes’ assertion fails for several reasons.

First, contrary to their assertion, the Elbazes *are* mentioned in the Agreement; their names appear on the first page of the letter, which is addressed to each of them and Danemar, collectively, and begins with the salutation, “Dear Danielle.”

Second, the Elbazes’ argument would be equally applicable to Danemar which, like the Elbazes, is also mentioned *by name* only on the first and the signature pages. The five page Agreement refers consistently and only to an undefined “you.” Nothing in the Agreement limits any enumerated right or obligation specifically to Danemar or to either individual defendant.

Third, contrary to the Elbazes’ assertion, the 2008/09 Agreement does differ from its predecessor agreements in several respects, just as those agreements differed (in ways unimportant here) from one another. Most significantly for purposes of our discussion, the 2008/09 Agreement, for the first time, contained signature lines whereby each of the Elbazes individually “agreed” to be bound by the terms and conditions of the Agreement.

The only evidence offered at trial regarding the reason COH required the individuals' signatures was Freedman's testimony on behalf of COH. He testified that, in drafting the contract, he wanted to ensure that the Elbazes bore personal responsibility because they wanted a longer (two-year) term distribution agreement than any to which COH had agreed in the past. Freedman also testified that COH wanted the Elbazes also to bear individual responsibility under the contract because it had become concerned they were attempting to or had attempted to evade the contractual prohibition on representation of COH's competitors by acting through another one of their companies.

Were Danemar the only party to the Agreement with COH, no purpose would be served by requiring the Elbazes also to sign in their individual capacities.³ An obligation, imposed on a number of persons, is presumed to be joint and several "[w]here the promise is made in the singular number, but is executed by each of the parties (so that each says in effect, 'I agree'). [Civ. Code, §] 1660; see *Webb v. Casassa* [(1927) 82 Cal.App. 307, 312].)" (1 Witkin, Summary of Cal. Law (10th ed. 2005) Contracts, § 109, p. 151.) "A 'joint and several' contract is a contract with each promisor and a joint contract with all, so that parties having a joint and several obligation are bound jointly as one party, and also severally as separate parties at the same time." (12 Williston on Contracts (4th ed. 1999) § 36.1, pp. 611–612; Civ. Code, § 1659.) The presumption of joint and several liability is not conclusive. "It is rebuttable but controls in the absence of evidence to the contrary." (*Kaneko v. Okuda* (1961) 195 Cal.App.2d 217, 227; Civ. Code, § 1961.)

³ As in California, in Spain, shareholders of a Joint Stock Company (*Sociedad Anonima*) do not generally have personal liability for company debts. (See Pombo, *Doing Business in Spain* (1987), § 12.03[5][a], p. 12-7.) In other words, once incorporated, the company becomes a new entity with a legal personality. "The effects of incorporation of the company as a legal entity, distinct from its members, are the following: It has the condition of being subject to law, that is, it has separate legal personality and has full legal capacity to make acquisitions to bind itself. The liability of the company is separate from that of the members." (*Id.* at § 12.02[1].)

Here, respondents offered no evidence to rebut the presumption of joint and several liability. They made no effort to counter factual evidence offered by COH's general counsel who testified that COH wanted to ensure that the individual respondents bore responsibility to perform under the Agreement because of its extended term and because COH was concerned that the Elbazes might circumvent contractual restrictions and represent COH competitors. Indeed, the only evidence offered by respondents was the testimony of Danielle Elba who testified only that she never bothered to find out why she had been required to be an individual signatory to the Agreement.

California subscribes to the objective theory of contracts. A party's undisclosed, subjective understanding or intention is neither binding nor relevant. (*Titan Group, Inc. v. Sonoma Valley County Sanitation Dist.* (1985) 164 Cal.App.3d 1122, 1127. Rather, "[i]t is the objective intent, as evidenced by the words of the contract, rather than the subjective intent of one of the parties, that controls interpretation. '[I]t is now a settled principle of the law of contract that the undisclosed intentions of the parties are . . . immaterial; and that the outward manifestation or expression of assent is controlling.' [Citations.]" (*Ibid.*; *Winet v. Price* (1992) 4 Cal.App.4th 1159, 1167 (*Winet*)). "Ordinarily, one who accepts or signs an instrument, which on its face is a contract, is deemed to consent to all its terms, and cannot escape liability on the ground that he or she has not read it." (1 Witkin, Summary of Cal. Law, *supra*, Contracts, § 118, p. 157.)

The Elbazes' outward manifestation of assent is evidenced by their individual signatures "agree[ing]" to the terms of the Agreement. As the jury was properly instructed, a party's unilateral mistake of fact or law will not excuse enforcement of a binding agreement. It was error for the jury to find that Danemar alone breached the Agreement. Construction of a contract is always a matter of law for the court unless interpretation turns on the credibility of extrinsic evidence. (*Nungaray v. Litton Loan Servicing, LP* (2011) 200 Cal.App.4th 1499, 1504.) Interpretation of a contract is ultimately a judicial function, although it is the jury's duty to resolve conflicts in extrinsic evidence properly admitted to interpret contractual language. (*Dell'Oca v. Bank of New*

York Trust Co., N.A. (2008) 159 Cal.App.4th 531, 556, fn. 16.) It follows then, that all three respondents should have been found parties to the Agreement to jury found that only Danemar breached. On this point we are satisfied that no additional evidence is necessary and we are in as good a position as the trial court to determine this issue as a matter of law. Accordingly, the matter is remanded to the trial court with instructions to vacate the judgment in favor of the Elbazes on COH's cause of action for breach of contract.

2. *Remand for determination as to damages*

COH argues that there is insufficient evidence to support the jury's decision to award only \$47,680, rather than the full amount of lost profits damages (\$731,390.64) it sought for respondents' breach. COH insists the jury had no choice but to calculate its damages according to a specific formula contained in the jury instructions.⁴

Respondents contend that the damages award is adequate because, in addition to the instruction on which COH relies, the jury was also instructed that, in order to recover damages, COH had to prove that it did all, or most, of the things the Agreement required it to do and did not unfairly interfere with respondents' right to receive the benefits of the Agreement. Respondents maintain that the damages awarded reflects the jury's determination that COH failed to meet this test.

The trial court's ruling denying COH's motion seeking a new trial based on inadequate damages may support respondents' theory.⁵

⁴ Specifically, COH asserts the jury was required to follow the formula set out in Instruction No. 353.

"4. From the figure determined in Paragraph 3, deduct the profits earned by COH on sales made by Boy Capel in 2009. The resulting amount is COH's lost profit."

⁵ The court's reasons for concluding that the damages award was not clearly inadequate were that there "was no evidence of any failure on the part of defendant Danemar to make every reasonable effort to sell COH products. The jury heard the Danemar witnesses describe their sales efforts. The witnesses appeared sincere and knowledgeable. The jury also heard evidence that COH did not deliver its product line to

“The question as to the amount of damages is a question of fact. In the first instance, it is for the jury to fix the amount of damages, and secondly, for the trial judge, on a motion for a new trial, to pass on the question of adequacy. Whether the contention is that the damages fixed by the jury are too high or too low, the determination of that question rests largely in the discretion of the trial judge. The appellate court has not seen or heard the witnesses, and has no power to pass upon their credibility. Normally, the appellate court has no power to interfere except when the facts before it suggest passion, prejudice or corruption upon the part of the jury, or where the uncontradicted evidence demonstrates that the award is insufficient as a matter of law. . . . [Citations.]” (*Gersick v. Shilling* (1950) 97 Cal.App.2d 641, 645.)

Respondents assert that the damage award of \$47,680 bears some relation to the evidence because it equates to the amount of lost profits claimed by COH for respondents’ failure to satisfy the minimums for the first two quarters of 2008. Whether that calculation was used or not, the question is whether the award finds sufficient support in the record. The trial court is in a better position than this court “to evaluate the amount of damages awarded in light of the evidence presented at trial.” (*County of Los Angeles v. Southern Cal. Edison Co.* (2003) 112 Cal.App.4th 1108, 1121.) The trial court’s determination is accorded great weight “because . . . the trial judge [is] necessarily more familiar with the evidence.” (*Bertero v. National General Corp.* (1974) 13 Cal.3d 43, 64.)

In light of our determination that the record contains insufficient evidence to support a verdict in favor of the Elbazes on COH’s breach of contract claim, we conclude

Danemar in time to sell during Madrid Fashion Week, that Fashion Week was the primary marketing vehicle used by Danemar, and that its sales representatives had to travel all over Spain to market the COH line as a result of the late delivery. The jury may reasonably have found that COH unfairly interfered with Danemar’s right to receive the benefits under the contract (see CACI 325). After weighing the evidence the court is not convinced from the entire record, including reasonable inferences therefrom, that the jury’s award of damages to COH clearly is inadequate.”

that the appropriate disposition is to remand this matter to the trial court with instructions to vacate the judgment and \$700 cost award in favor of the Elbazes on the complaint.

II. The Appeal by Danemar

1. Contractual targets vs. minimum purchase requirements

Danemar's appeal asserts that the trial court erred by excluding parol evidence it claims would have shown that the Agreement's minimum purchase requirement was no more than a suggested "target."

To support this assertion, Danemar relies on testimony by Danielle Elbaz, given outside the presence of the jury, about a conversation she had with Gary Dahan (Dahan), the father of COH's founder, regarding the 2004 distribution agreement. When the trial court provisionally heard this challenged testimony, Danielle Elbaz never attributed to COH any statement that the minimum purchase requirements in the 2008/09 Agreement at issue here were intended only as suggested targets. Indeed, Danemar does not point to any testimony (admitted or proffered) that the parties discussed any term of the 2008/09 Agreement. The evidence was undisputed that the parties did not discuss the meaning of the term "minimum quantities" in the Agreement.

Terms in a written contract intended by the parties thereto to be a final expression of their agreement may not be contradicted by evidence of any prior agreement or any contemporaneous oral agreement. (Code Civ. Proc., § 1856, subd. (a).) If a written contract is meant by its signatories to be "a complete and exclusive statement of the terms of the agreement" it may not be "explained or supplemented," even by consistent additional terms. (Code Civ. Proc., § 1856, subds. (b), (c); *Alling v. Universal Manufacturing Corp.* (1992) 5 Cal.App.4th 1412, 1433.)

The Agreement contains an integration clause which states that the writing sets forth the parties' entire agreement, supersedes all prior agreements and discussions, and that no promises or agreements were made that are not set forth in the Agreement. The integration clause is conclusive evidence that the Agreement sets forth the final, complete, and exclusive terms of the parties' contract and estops Danemar from contending otherwise. (See Evid. Code, § 622 ["facts recited in a written instrument are

conclusively presumed to be true as between the parties thereto]; *Banco do Brasil, S.A., v. Latian, Inc.* (1991) 234 Cal.App.3d 973, 1001–1002.)

The trial court found that paragraph 2 of the Agreement establishes, in unambiguous language, minimum purchase requirements respondents had to satisfy. Danemar asserts that the trial court erred by refusing to permit extrinsic evidence that those “minimum quantities provisions of the distribution agreement were targets only.” Danemar provides no authority for its bald assertion that the court should ignore the express terms of the integrated Agreement, and rely instead on promises purportedly made years before the Agreement was executed, if they were made at all. Indeed, Danemar’s counsel asked Freedman at trial whether “Gary Dahan [of COH] told Danemar that those minimums were targets and not guaranteed purchases.” Freedman, who was (and remains) COH’s general counsel in 2005, said he had “no knowledge” such a statement was ever made.

As discussed above, California subscribes to the objective theory of contracts. A party’s subjective understanding or intention is neither binding nor relevant. (*Titan Group, Inc. v. Sonoma Valley County Sanitation Dist.*, *supra*, 164 Cal.App.3d at p. 1127. It “is the objective intent, as evidenced by the words of the contract, rather than the subjective intent of one of the parties, that controls interpretation.” (*Ibid.*)

The Agreement provides that respondents “must” purchase certain minimum quantities by specified dates. The term “must” is not permissive. (*In re Kler* (2010) 188 Cal.App.4th 1399, 1402 [““[m]ust” is mandatory”]; *Pryor v. Pryor* (2009) 177 Cal.App.4th 1448, 1455.) Danemar’s contention that paragraph 2 merely sets forth suggested “targets,” has no merit.

2. *Termination as exclusive remedy*

Danemar also maintains the trial court erred by excluding evidence it claims would show that paragraph 16 of the Agreement was intended to preclude any damages award to COH.

If, as here, a contract term is asserted to be ambiguous, the trial court follows a two-step process. The court provisionally hears the proffered parol evidence to

determine whether the term at issue is ambiguous and, if so, whether it is reasonably susceptible to the interpretation urged by the offering party. If the answer to both questions is “yes,” the evidence is admitted. (*Winet, supra*, 4 Cal.App.4th at p. 1165.) If not, the evidence is excluded. (*Banco do Brasil v. Latian, supra*, 234 Cal.App.3d at p. 1001).

The exception to the parol evidence rule allowing the introduction of evidence to clarify an ambiguity is “restricted to its stated bounds; it does no more than allow extrinsic evidence of the parties’ understanding and intended meaning of the *words used in their written agreement*.” (*Brawthen v. H&R Block, Inc.* (1972) 28 Cal.App.3d 131, 136.) It is “not a cloak under which a party can smuggle extrinsic evidence to add a term to an integrated contract, in defeat of the parol evidence rule.” (*Bionghi v. Metropolitan Water Dist.* (1999) 70 Cal.App.4th 1358, 1365.)

Danemar contends the trial court erred by excluding two evidentiary items it insists shows that COH intended to waive damages. The first involves testimony by Danielle Elbaz about a statement made by Dahan in November 2004 regarding the 2005 distribution agreement. Danielle said that, when she raised her concern about Danemar’s ability to satisfy the minimum purchase requirements in that agreement, Dahan told her not to “worry, if in case you’re not able to reach them [COH] can rescind the contract.” There was no discussion about damages.

First, as the trial court observed, no evidence was offered to establish (for purposes of the exception in Evid. Code, § 1222), that Dahan was authorized to negotiate or discuss contractual terms on behalf of COH in November 2004. The only testimony regarding Dahan’s authority was that he was the father of the company’s founder and designer, and a nonemployee third party “acting on behalf of [COH] to discuss distribution arrangements in various countries in Europe” in connection with a 2004 agreement. That contract was signed about 10 months before Dahan’s conversation with Danielle Elbaz, and there is no evidence that Dahan was authorized to negotiate on behalf of or to bind COH on the 2005 contract about which she testified. Accordingly, the court properly excluded Dahan’s statement as hearsay.

The trial court also refused to permit the jury to hear this evidence because it found Dahan's statement was not relevant because it "doesn't address the point of concern whether damages could still be available" in the event of termination or rescission. That ruling was also correct. Even if COH had a right to rescind a prior contract, that remedy was not necessarily its exclusive remedy under that contract, let alone under the Agreement at issue, into which the parties entered several years later and which contains very different language.⁶ Moreover, a right of rescission or termination is not inconsistent with a right to also sue for damages. Even *Delta Dynamics, Inc. v. Arioto* (1968) 69 Cal.2d 525 (*Delta Dynamics*), on which Danemar relies, held that, absent evidence showing the parties had a contrary intention, the inclusion of a right to terminate in event of a breach does not limit the nonbreaching party's remedy solely to termination. Damages remain available. (*Id.* at pp. 529–530.)

Similar deficiencies arise with regard to the second evidentiary item Danemar sought to introduce to demonstrate that COH was limited to termination for breach. Danemar proffered testimony of a purported conversation in March 2006 between "Lela from Citizens of Humanity" and Danielle Elbaz to the effect that, if the contract then in effect were terminated, COH "would take back the stock and . . . send the orders that [Danemar] had already placed." No evidence was offered that Lela was authorized by COH in 2006 to make that statement, let alone that she had the authority to negotiate or modify COH's contracts. The proffered statement by Lela was also properly excluded as inadmissible hearsay. The only testimony regarding the extent of Lela's authority was that she was "in charge of sales at [COH] in November of 2008." But there was no showing that her statement to Danielle Elbaz had been made in the context of

⁶ The 2005 agreement does not contain an integration clause or a termination provision analogous to the 2008/09 Agreement. Its only mention of termination is in a paragraph that prohibits Danemar from transferring its exclusive distributorship to a third party. COH was given the right to terminate in the event of such transfer or a change of ownership at Danemar.

negotiations of the 2008/09 Agreement, or in the negotiation of any agreement between the parties. In addition, as with the statement attributed to Dahan, the trial court found that Lela's statement failed to address the issue of "whether damages could still be available" in the event of termination or rescission.

Danemar's reliance on *Delta Dynamics*, *supra*, 69 Cal.2d 525 is misplaced. There, the specific evidence defendant sought to offer was not in the record (because no proffer was made). The Supreme Court nevertheless believed that defendant would have testified that, during negotiations of the contract at issue the parties explicitly discussed the consequences of a failure by defendant to purchase the minimum number of locks specified by that contract, and that plaintiff expressly assured the defendant that plaintiff "intended termination to be an exclusive remedy." (*Id.* at p. 528, fn. 1.) Here, in contrast, the specific parol evidence proffered by Danemar is in the record. The trial court did what it was required to do by *Delta Dynamics* and *Winet*, *supra*, 4 Cal.App.4th 1159. It provisionally heard the proffered evidence outside the presence of the jury, and determined it was inadmissible. (*Delta Dynamics*, at p. 528; *Winet*, at p. 1165.) When making its record, Danemar presented no evidence that the parties had explicitly discussed paragraph 16 of the Agreement and no evidence that anyone at COH assured Danemar that COH "intended termination to be an exclusive remedy."

The trial court properly concluded that, even crediting the proffered parol evidence, the Agreement was not reasonably susceptible to the interpretation offered by Danemar—i.e., that COH had agreed to relinquish a right to sue for damages. Under California law, absent evidence of a contrary intent, the parties' inclusion of a right to terminate does not displace damage remedies. (*Delta Dynamics*, *supra*, 69 Cal.2d at pp. 529–530.)

3. *Failure to instruct on intentional interference with contract*

In November 2008 COH was approached by Boy Capel which sought to replace Danemar as COH's sales agent in Spain and Portugal. On March 10, 2009, COH entered into an exclusive sales agreement with Boy Capel. Danemar contends that, as early as March 2, 2009, and prior to COH's termination of the Agreement, Boy Capel began

taking orders for COH apparel in Spain. COH did not advise Danemar of this change, but instructed it to keep selling. Danemar paid COH for \$24,500 of the \$51,383 in orders it had already placed, but COH did not ship Danemar any order. Instead, COH sent Danemar's orders to Boy Capel. Danemar contends that on April 1, 2009, Boy Capel sent COH orders it rewrote from orders Danemar took in February and March 2009, before COH terminated the Agreement. Danemar maintains this evidence supports its claim for intentional interference with contract and that the trial court erred when it refused to so instruct the jury. Again, we conclude otherwise.

The elements of a cause of action for intentional interference with contract are: ““(1) a valid contract between plaintiff and a third party; (2) defendant's knowledge of this contract; (3) defendant's intentional acts designed to induce a breach or disruption of the contractual relationship; (4) actual breach or disruption of the contractual relationship; and (5) resulting damage.”” (*Quelimane Co. v. Stewart Title Guaranty Co.*, (1998) 19 Cal.4th 26, 55–56 (*Quelimane*).) The trial court's refusal to instruct the jury on the tort of interference with contract was proper; the evidence does not support such an instruction. Danemar failed to introduce evidence that would support a finding in its favor on at least three elements.

First, Danemar ignores the trial court's adverse finding as to the first element—the requirement of a valid contract between plaintiff and a third party. Danemar was unable to name specific customers with which it had contracted. The trial court noted that the requested instruction (CACI No. 2201), requires identification of specific customers.

Second, Danemar's counsel conceded that Danemar could not introduce evidence as to the fifth element—resulting damage. Specifically, in response to the trial court's observation that there was “no evidence that Danemar suffered any damages from [COH's alleged interference],” Danemar's counsel said he was unable to introduce such evidence because the trial court had refused to permit it. Both points were correct. The trial court excluded, for lack of foundation, Puig's attempt to testify to Danemar's anticipated profits in 2009. Danemar does not challenge the exclusion of that evidence

on appeal and, thus, forfeits the point. Absent evidence of damages, the court's refusal to give the requested instruction was not improper.

Finally, Danemar failed to present evidence that would support a finding in its favor on the third element intent to harm Danemar. Danemar relies heavily on *Quelimane, supra*, 19 Cal.4th 26, but that decision demonstrates why an instruction would have been improper. *Quelimane* explains that a defendant that acts to advance its own interests (as opposed to acting to harm the plaintiff) does not act with the requisite intent: “‘If the actor is not acting criminally nor with fraud or violence or other means wrongful in themselves but is endeavoring to advance some interest of his own, the fact that he is aware that he will cause interference with the plaintiff's contract may be regarded as . . . a minor and incidental consequence’” (*Id.* at p. 56.)

The court in *Quelimane, supra*, 19 Cal.4th 26 allowed the plaintiff to pursue its claim. But it did so at the pleading stage and because the plaintiff had alleged that defendants had “‘deliberately, willfully, and intentionally interfered with the contractual relations’” (*Id.* at p. 57.) The court suggested that the plaintiff might be unable at trial to prove the defendant had “‘intended to interfere’” with the contracts in question and suggested that defendant could likely “‘establish that it had a legitimate business purpose which justified its actions.’” (*Ibid.*) That is what occurred here.

There is no evidence that COH acted “‘criminally’” or “‘with fraud or violence or other means wrongful in themselves.’” (*Quelimane, supra*, 19 Cal.4th at p. 56.) Nor is there any evidence that COH acted for any reason other than to “‘advance some interest of [its] own,’” not to harm Danemar. (*Ibid.*) Freedman testified that COH: (1) decided to change distributors after respondents failed to purchase the minimums in 2008 and after they told COH Danemar did not expect to meet the minimums in 2009, (2) decided to use Boy Capel in order to advance the best interests of COH and its employees, and (3) directed the orders Danemar had placed to Boy Capel hoping Boy Capel could make the same sales at prices that did not violate the maximum price provision in the Agreement.

In the absence of evidence to support three of the five *Quelimane, supra*, 19 Cal.4th 26 elements, there was no basis for Danemar's requested instruction on interference with contractual relations, and the trial court's refusal to give the requested instruction was not error.⁷

4. *Limitation on Danemar's profits*

Finally, Danemar asserts that the trial court erred in failing to instruct the jury that it was entitled to lost profits on the orders it placed and had not paid for before COH terminated the contract.

This contention is rejected. Danemar forfeited the assertion by failing to support it with argument or authority. It is a fundamental tenet of appellate review that the judgment appealed from is presumed correct. (*Denham v. Superior Court* (1970) 2 Cal.3d 557, 564.) A necessary corollary to this is that appellant bears the burden to overcome this presumption by providing proper argument and legal authority to support each assertion of error. "One cannot simply say the court erred, and leave it up to the appellate court to figure out why." (*Niko v. Foreman* (2006) 144 Cal.App.4th 344, 368.)

Where, as here, a party asserts error but fails to support its assertion with reasoned argument and citations to authority, we may treat the point as waived. (*In re Marriage of Falcone & Fyke* (2008) 164 Cal.App.4th 814, 830.) Danemar cites no authority and provides no reasoned argument to support its contention that COH was obligated to honor orders for which Danemar had not paid before COH terminated the Agreement. Accordingly, Danemar has forfeited this point on appeal. (*Ibid.*)

⁷ Our conclusion makes it unnecessary to address COH's alternative theories that Danemar improperly sought to recover in tort for a breach of contract, and that no better result would have obtained had the jury had been instructed as Danemar requested.

DISPOSITION

The judgment and cost award in favor of Marc and Danielle Elbaz on Citizens of Humanity's complaint for breach of contract is reversed. In all other respects, the judgment is affirmed. Each party shall bear his, her or its own costs of appeal.

NOT TO BE PUBLISHED.

JOHNSON, J.

We concur:

MALLANO, P. J.

CHANEY, J.